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**INTERNET**
***commerce & communications***
**DIVISION**

**Mark Uncapher**
**Senior Vice President & Counsel**

March 17,2003

Ms. Marlene **H.** Dortch,
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20054

Re: ITAA Ex Parte Presentations - <u>CC Docket 02-33.98-10</u>

Dear **Ms.** Dortch:

Pursuant to **47** C.F.R. § 1.1206(b), this letter is to inform you that exparte presentations were made on Friday March 14, 2003 at meetings regarding issues in the above-referenced proceedings.

Participating in the meeting were: Michael Casowitz, Gail Cohen, Jane Jackson William Kehoe, Carol Mattey, Terri Natoili, Brent Olson, Cara Voth, and Diane Law Shu, of the WCB and Harry Wingo **of** the OGC

They met with; Kim Ambler, Dir, Industry & Policy Affairs of the Boeing Company and Chairman of the ITAA Telecommunication Policy Committee Jonathan Jacob Nadler **of** Squire, Sanders & Dempsey, LLP, representing ITAA; and Mark Uncapher, Senior Vice President of Internet Commerce & Communications Division of ITAA.

The issues addressed in this meeting are outlined fully in the attached written ex parte presentation, which was provided during the meetings.

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In accordance with Section **1.1206,** an original and two copies of this letter and attachment are being submitted to the Secretary's office on this date. Please address any questions regarding this matter to me.

Sincerely,

Mark Uncapher

Enclosure

cc:
Michael Casowitz,
Gail Cohen,
Jane Jackson
William Kehoe,
Carol Mattey,
Terri Natoili,
Brent Olson,
Cara Voth,
Diane Law Shu, all of the WCB
Harry Wingo of the OGC
Kim Ambler, Boeing
Jonathan Jacob Nadler, Squire Sanders & Dempsey

Ex Parte Presentation of the Information Technoloev Association of America - CC Docket 02-33 & 95-20

# The Commission Should Continue to Require the ILECs to Provide Broadband Transmission as an Unbundled Telecommunications Service

March **14,2003**

- **ITAA is the Principal Trade Association of the Computer Software and Services Industry**

  -- 500 U.S. members, from multinational corporations to locally based enterprises

  -- Many of ITAA's members are Information Service Providers, which remain critically dependent on the ILECs for broadband and narrowband telecommunications services

  -- For thirty years, ITAA has participated in Commission proceedings, including all aspects of the ***Computer Inquiries,*** governing ILECs' obligations to provide the telecommunications services that ISPs require to serve their subscribers

  -- ITAA is also a member of the Coalition of Broadband Users and Innovators, which was formed to preserve users' rights to access information available on the Internet without impairment by broadband network operators

- **Overview of the Presentation**

  -- Today's competitive **ISP** market provides significant consumer benefits

  -- Elimination of the ILECs' ***Computer II*** unbundling obligations would create a duopoly, in which most consumers would be forced to choose between an ILEC-affiliated and a cable-affiliated ISP

  -- The Commission lacks authority to eliminate the ILECs' unbundling obligations

  -- There is no policy justification for eliminating the ILECs' ***Computer ZZ*** unbundling obligation

  -- The Commission should eliminate its ineffective CEVONA **rules** now, while linking to the removal of effective competitive safeguards to the availability of competitive alternatives to the ILECs' wholesale broadband transmission services

- Today's Competitive ISP Market Provides Significant Consumer Benefits

  -- ISPs are more than fungible "conduits" to information

  -- ISPs compete based on a variety of factors, such as: price; service level; applications support; proprietary applications; premises equipment; security; and privacy

  -- Competition among ISPs has led to lower prices, increased quality, and significant innovation; it has also ensured that consumers have unimpeded access to on-line information

- Elimination of the ILECs' Unbundling Obligations Would Create a Duopoly, in Which Most Consumers Would be Forced to Choose Between an ILEC-affiliated and a Cable–affiliated ISP

  -- If the Commission lifts the Computer ZZ unbundling obligation, ILECs could drive non-affiliated broadband ISPs from the market by refusing to provide broadband telecommunications – or by providing service at higher prices, or on far less favorable terms, than those enjoyed by the ILECs' information service operations

  -- The end-result would be a duopoly – consisting of an ILEC-affiliated and a cable-affiliated broadband ISP; absent government regulation, these providers could significantly restrict consumers' access to on-line content

  -- CLEC "intra-modal'' competition does not effectively constrain the ILECs' ability to discriminate in the provision of broadband telecommunications services; indeed, competitive provision of DSL will become virtually impossible as a result of the Commission's decision to eliminate the line-sharing requirement

  -- Cable systems do not provide effective "inter-modal" competition

    + While some cable systems are "partnering" with a handful of selected ISPs, no cable system has offered to make broadband capacity generally available to any requesting ISP

    + Cable systems typically do not serve business customers

    + Many cable systems have not yet been "upgraded" to provide broadband

- The Commission Lacks Legal Authority to Eliminate the ILECs' Unbundling Obligations

  -- The Commission has repeatedly recognized that, in addition to the ***Computer II*** Rules, the non-discrimination requirement in Section 202 of the Communications Act requires facilities-based carriers to unbundle the telecommunications functionality that they use to provide information services ***(See Interexchange Order*** (1995); ***Frame Relay Order*** (1995); ***CPE/Enhanced Services Bundling Order*** (2001))

  -- The Commission cannot forebear from enforcing this requirement: Section 10 of the Communications Act precludes the Commission from forbearing from imposing any statutory provision necessary to ensure that a carrier's practices are not "unreasonably discriminatory"

  -- The Commission cannot "end run" the limits on its forbearance power by reclassifying wireline broadband telecommunications services as private carriage, and then developing a new regulatory regime pursuant to Title I

    + In *ASCENT,* the D.C. Circuit rejected a similar effort by the Commission to avoid the limitations on its forbearance power by "reclassifying" a common carrier

    + The Commission, and the courts, have repeatedly recognized that Title I is a limited grant of authority: The Commission cannot selectively "download" Title II obligations onto entities subject to its Title I authority

    + Reclassification of broadband telecommunications as a Title I offering would inevitably lead to imposition of regulations on **ISPs**

      * The "basic/enhanced dichotomy," established in ***Computer ZZ,*** created a clear line of demarcation between regulated transmission services and non-regulated offerings that ***use*** telecommunications to provide value-added services

      * If the Commission classifies broadband telecommunications as a Title I service, but imposes selected Title II regulations, demands for "regulatory symmetry" could lead the Commission to impose identical regulations on information services, which also are subject to the Commission's Title I authority; this would undermine congressional policy opposing regulation of the Internet

- **Concerns About Broadband Facilities Deployment and "Regulatory Symmetry" Do Not Provide a Basis for Eliminating the *Computer ZZ* Unbundling Rule**

  -- The "unbundling" required by the ***Computer*** ZZ Rules is fundamentally different from the "unbundling" required by the ***Local Competition Order***

    + Under the ***Local Competition Order,*** ILECs must provide competitors with access to physical elements of their network at TELRIC-based prices

    + By contrast, the ***Computer*** ZZ Rules merely require the ILECs to offer telecommunications services that they have chosen to provide to themselves to non-affiliated ISPs on just, reasonable and non-discriminatory terms; therefore, these rules do not create any disincentive for ILECs to deploy broadband facilities

  -- The fact that cable system operators are not legally obligated to provide unbundled transmission service on request – and because, in practice, they do not do so – makes it ***more*** important to ensure that the ILECs fulfill their common carrier obligations

- **The Commission Should Eliminate Its Ineffective CEI/ONA Rules Now, While Linking the Removal of Effective Competitive Safeguards to the Availability of Competitive Alternatives to the ILECs Wholesale Broadband Transmission Services**

  -- The Commission should eliminate regulatory obligations that serve no useful purpose

    + ONA has failed

      * The failure to require the BOCs to fundamentally unbundling their network, and the requirement that **ISPs** pay above-cost carrier access charges to obtain ONA Basic Services Elements, doomed ONA from the start

      * Today, ONA is simply irrelevant to broadband ISPs

    + The Commission has eviscerated the CEI Plan requirement to the point that it no longer services any useful purpose

  -- The Commission should retain effective safeguards – such as the ***Computer II*** unbundling requirement – until the ILECs can demonstrate that ISPs have a meaningful choice of broadband transmission service providers

**Ex Parte Presentation of the Information Technoloev Association of America – CC Docket 02-33. 98-10**

# The Commission Should Not Extend the Obligation Make Direct Payments to the Universal Service Fund to Information Service Providers

March 14,2003

- ITAA is the Principal Trade Association of the Computer Software and Services Industry

  -- 500 U.S. members, from multinational corporations to locally based enterprises

  -- Many of ITAA's members are Information Service Providers, which remain critically dependent on the ILECs for broadband and narrowband telecommunications services

  -- For thirty years, ITAA has participated in Commission proceedings, including all aspects of the ***Computer Inquiries,*** and has consistently supported the Commission determination that ISPs are ***users*** of telecommunications services and, therefore, are not subject to carrier regulation

- Overview of the Presentation

  -- Because they do not "provide" telecommunications, the Commission cannot require ISPs to make direct payments to the USF

  -- Concerns about "sufficiency" or "competitive neutrality" do not provide a basis to require ISPs to make direct payments to the USF

  -- Requiring ISPs to make direct payments to the USF would have adverse consequences

- Because They Do Not "Provide" Telecommunications, the Commission Cannot Require ISPs to Make Direct Payments to the USF

  -- Section 254 allows the Commission to require entities that "provide" interstate telecommunications to make direct payments to the USF

  -- ISPs ***use*** telecommunications; they do not ***provide*** it to themselves or to others (see S. Rept. 104-23, 104" Cong., 1st Sess., at 28 (1995); ***Report io Congress on Universal Service,*** 13 FCC Rcd 11501,11534 n.138 (1998))

-- The possibility that an ISP may own its own "last mile" facilities does not provide a basis for imposition of universal service payment obligations on the ISP

+ If the ISP is not a carrier, then the ISP "does not offer 'telecommunications' to anyone, it merely uses telecommunications to provide end-users with wireline Internet access service." ***Broadband Wireline Internet Access Notice,*** 17 FCC Rcd 3019,3033 (2002)

+ If the ISP is affiliated with a carrier, then the carrier provides telecommunications service to the affiliated ISP and makes a payment to the **USF** based on the price of the telecommunications service; the ISP is not required to make an additional USF payment

- Concerns about "Sufficiency" or "Competitive Neutrality" Do Not Provide a Basis to Require ISPs to Make Direct Payments to the **USF**

-- Requiring ISPs to make direct payments to the **USF** is not necessary to address concerns about the sufficiency of the **USF** funding base

+ The growth of broadband Internet access service has increased demand for telecommunications services, thereby increasing the **USF** funding base

+ The introduction of Voice Over Internet services is having a negligible impact on the **USF** funding base

* Less than five percent of all interstate and international traffic is carried over the public Internet

* Much of this traffic consists of low-cost calls that never would have been placed over the PSTN

+ In any case, adoption of a connection-based assessment methodology will address concerns about the sufficiency of the **USF**

-- Requiring ISPs to make direct payments to the **USF** is not necessary to address concerns about competitive neutrality

+ The Commission's current rules are competitively neutral: All providers of interstate telecommunications services make direct payments to the **USF;** no ISP makes a direct payment to the **USF**

+ Requiring ISPs to make direct payments to the USF would single out ISPs for "double payment" obligations – once as a user and once as a service provider – the very opposite of competitive neutrality

+ Imposition of USF payment obligations on "facilities-based ISPs" is not necessary to promote competitive neutrality

  * There is no evidence that ISPs are deploying facilities to obtain a competitive advantage by avoiding making USF payments

  * Imposing USF payment obligations **on** "facilities-based ISPs" would mark a significant expansion in the Commission's use of its Section **254** "permissive authority" – which, up until now, the Commission has applied only to private carriers that compete directly against common carriers

  * As the Commission recognized in the ***Report to Congress,*** imposing USF payment obligations **on** "facilities-based ISP" based on the value of the telecommunications services they "provide themselves" would create "significant operational difficulties" under a revenue-based system

- Requiring ISPs to Make Direct Payments to the USF Would Have Adverse Consequences

  -- Requiring ISPs to make the same USF payments as telecommunications carriers would contravene the congressional policy against imposing regulation on the Internet

  -- Treating ISPs like carriers for ***universal service*** purposes would undermine the Commission's long-standing policy of treating ISPs **as** end users for ***access charge*** purposes

  -- Extending carrier-type regulation on ISPs would undermine the U.S. Government's efforts to prevent imposition of regulatory "charging arrangements" **on** international Internet traffic

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